

STATE OF TENNESSEE
DEPARTMENT OF EDUCATION

[REDACTED]

Case No. 01-27

Claimant,

ALJ: HON. KEVIN S. KEY

vs.

THE DEPARTMENT OF
CHILDREN'S SERVICES

Respondent.

COVER SHEET

For the purposes of allowing circulation of this Opinion while protecting the confidentiality of the student. Persons to be identified are as follows:

[REDACTED] - "Student" or "Child"

[REDACTED] - "Mother" or "Parent"

DECISION

Facts

The facts are taken substantially from the brief of the State as they are uncontroverted for the Student and are also taken from the documents submitted by both parties.

The Student was certified by his LEA as eligible for special education and related services in 1990 because of a certification as learning disabled. The Student received these special education services from 1990 to 1996 while in the LEA and in the custody of his mother.

In 1996 the local county Juvenile Court adjudicated the Child delinquent and in need of treatment and rehabilitation. (See Juvenile Court order for Cocke Court dated January 4, 1996.) The Child was placed in the custody of the Tennessee Department of Children's Services which placed the Child in a residential treatment facility from January 1996 through February 1997. For the first eight months of being in State custody the Student received special education and related services at a private, non-profit educational facility, but then from September 1996 through February 1997 he received educational services at the local middle school. In February 1997 through July 1997 the Student received residential services at the Wilderness Camp, a residential facility, and attended an on-campus school.

Also, in 1996 the Child was certified as disabled under SSI regulations and began receiving funds under that system. The State used these social security funds to defray the costs of his residential placement while in State custody.

In late 2000 the Student became 18 and upon obtaining majority filed this due process hearing request requesting reimbursement of funds and the interest thereon used by the State during the period of his minority for the period of January 1996 to

July 1997. This claim was based on the allegation because the Student was a special education student that all educational costs, including his residential placement were to be provided at cost by the State as part of free and appropriate public education (FAPE) under IDEA (20 USC Sections 1401 et seq.).

After the request for the due process hearing was received by the Tennessee Department of Education in May 2001 the due process hearing was assigned to this Administrative Law Judge and an extensive period of discovery followed. After telephonic motions before the Administrative Law Judge, the State filed a Motion to Dismiss with response by counsel for the Student and response by the State. This decision is based upon the matters placed in the record at that time and with subsequent requests for supplementation by the Administrative Law Judge to derive at this decision.

Discussion

I. ANY MATTER RELATING TO THE PROVISION OF FREE AND APPROPRIATE EDUCATION UNDER 20 U.S.C. §1401 *ET SEQ.* AND TENNESSEE CODE SECTION 49-10-101 *ET SEQ.* IS WITHIN JURISDICTION OF THE ADMINISTRATIVE LAW JUDGE.

In the Motion to Dismiss the State argued that this Administrative Law Judge lacks jurisdiction to review the provision of FAPE under The Individuals With Disabilities Education Act (IDEA). State of Tennessee has sought to deny jurisdiction to this Administrative Law Judge based upon doctrines of sovereign immunity, the 11th Amendment and the Tennessee Constitution. This argument must fail.

All students with disabling conditions have rights to due process and equal protection under the 14th Amendment of the United States Constitution. As a result, the State of Tennessee would be subject to constitutional litigation in federal courts for each and every case concerning the provision of special education, but the United

States Congress has provided a comprehensive scheme for addressing these issues through 15 U.S.C. §§1401 *et seq.* The State of Tennessee has accepted federal funds under 15 U.S.C. § 1411 and has placed itself within the provisions of this Act. Indeed, to further guarantee and strengthen the rights of disabled students the Tennessee General Assembly has enacted Tennessee Code Annotated §§ 49-10-101 *et seq.* and the Tennessee Department of Education has enacted attendant regulations to provide for the resolution of rights of disabled students, just as this student in this manner. As a result, the Motion to Dismiss on this basis must be DENIED.

However, the jurisdiction of the administrative officer is limited to issues arising under special education law. There is no pendent jurisdiction by an administrative law judge appointed under IDEA on the propriety of the use of the Social Security funds. An Administrative Law Judge only has jurisdiction on the claim that the State had an independent duty to provide residential placement at no cost under IDEA, thus obviating the need to use the Social Security funds for alleged educational purposes.

Indeed, a party claiming under IDEA must go through the administrative law process in order to exhaust the special education aspect of the matter before asserting other claims. This was the argument of the LEA in Fessler v. Giles County Board of Education, U.S. District Court, Middle District of Tennessee 1-00-120, decided January 22, 2002, which held the parent was required to first exhaust his administrative remedies. The Court in Fessler strongly relied on the 6th Circuit Court rulings in Covington v. Knox County School System, 205 F.3d 912 (6th Cir., 2000) and on Crocker v. TSSAA, 873 F.2d. 933 (6th Cir. 1989) both of which required exhaustion absent compelling circumstances. Based on the controlling authorities the Student has properly come to this forum to exhaust his remedies.

II. THE STATUTE OF LIMITATIONS IS NOT TOLLED AND ANY CLAIMS UNDER IDEA HAVE NOT BEEN TIMELY

The Student seeks recovery for the period beginning with his placement in State custody and the use of the Social Security funds for the residential facilities for the period of January 1996 to July 1997. This claim was asserted April 25, 2001, almost four years later. The IDEA and the concurrent federal regulations do not toll the time period for claims under the IDEA. Rather, the Student's rights are vested in the parent who must assert these rights and if the parental rights are terminated, the LEA or in this case, the State must guarantee the student a trained surrogate parent to assert these rights on behalf of the student. (See Opinion of Tennessee Attorney General 02-022 for interrelation of State custody and IDEA rights.) There is no showing that the student did not have an appropriate surrogate parent, and if there were no surrogate parent appointed for this child, this alone would be a serious void of the student's rights under IDEA and state law.

As a result, this Administrative Law Judge must ascertain the appropriate statute of limitations for the assertion of rights under the IDEA in the State of Tennessee. There is no federally mandated statute of limitations. This Administrative Law Judge finds that Tennessee Code Annotated §28-3-104, the statute of limitations for civil rights actions, which is one year, is most analogous. As stated above, special education law and its attendant rights are based on the grounded on the federal civil rights of equal protection and due process.

The Sixth Circuit, in a case asserted under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) a parallel statute providing protection for the disabled applied the Kentucky one-year statute of imitations for personal injury actions. Hill v. Knott Co. Board of Education, 941 F2d 402 (1991). The student, who was 30 and a late graduate of high school because of her disabilities sought to assert a separate Kentucky statute

which allowed a five-year statute of limitations for claims against the state. The Sixth Circuit disagreed stating:

The Rehabilitation Act has no built in statute of limitations. As in other respects, it resembles the civil rights legislation codified as 42 U.S.C. §1983. Federal law normally fills such gaps by importing a limitations period determined by reference to the most closely analogous statute of limitations of the state in which the claim arose. Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1938; 85 L Ed 2d 254 (1985) where it was held that a claim under §1983 must be brought within the period prescribed by state law for personal injury actions, personal injury actions being most closely analogous to civil rights actions. *Id.* at 407-408.

Applying the logic the Court in the Hall case, because the IDEA is based on civil rights, then Tennessee Code Annotated §28-3-104, a one-year statute of limitations for civil rights action must apply. The claimant's request for relief accrued in July 1997. The IDEA claim is time barred.

This holding, however, applies only the claims based on special education law. As noted above, the student had a duty to resolve the special education issues first, and then could appeal to the appropriate federal district court, at which time the independent Social Security claims could be asserted. Separate tolling provisions for those statutes are not within the jurisdiction of this Administrative Law Judge.

IT IS SO ORDERED this 19 day of September, 2002.



KEVIN S. KEY #9519
Administrative Law Judge
217 Second Avenue North
Nashville, TN 37201
(615) 256-4080

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by depositing a copy thereof in the U.S. Mail, postage prepaid, in envelopes addressed to Theresa Vay Smith and Lenny Croce, Rural Legal Services, P.O. Box 5209, Oak Ridge, TN 37831, attorneys for [REDACTED], William Allen, attorney for the Parent, 136 South Illinois Avenue, Suite 104, Oak Ridge, TN 37830 and Jude White and Mary A. Walker, Office of General Counsel, Dept of Children's Services, 25th Floor, Tennessee Tower, 312 Eight Avenue North, Nashville, TN 37243 on this the 14th day of September 2002.


KEVIN S. KEY #9519